

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Review of the Emergency Alert System)	EB Docket No. 04-296
)	
)	

**COMMENTS OF MUNICIPALITIES AND MUNICIPAL ORGANIZATIONS
CONSISTING OF:**

**National Association of Telecommunications Officers and Advisers;
International Municipal Lawyers Association; National Association of Counties;
United States Conference of Mayors; National League of Cities;
Texas Coalition of Cities for Utility Issues;
City of Ann Arbor, Michigan; City of Belding, Michigan; City of Detroit, Michigan;
City of Livonia, Michigan; City of Marquette, Michigan; City of Mesa, Arizona;
City of Wyoming, Michigan; Glen Arbor Township, Michigan;
Village of Paw Paw, Michigan; Village of Skokie, Illinois**

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COMMENTS OF MUNICIPALITIES AND MUNICIPAL ORGANIZATIONS

Pursuant to the Commission's August 12, 2004 Notice of Proposed Rulemaking ("NPRM") in the above entitled matter, Municipalities and Municipal Organizations ("Municipalities"), consisting of the National Association of Telecommunications Officers and Advisers; the International Municipal Lawyers Association; the National Association of Counties; the National League of Cities; the Texas Coalition of Cities for Utility Issues; the United States Conference of Mayors; the City of Ann Arbor, Michigan; the City of Belding, Michigan; the City of Detroit, Michigan; the City of Livonia, Michigan; the City of Marquette, Michigan; the City of Mesa, Arizona; the City of Wyoming, Michigan; Glen Arbor Township, Michigan; the Village of Paw Paw, Michigan; and the Village of Skokie, Illinois hereby submit their Comments.

SUMMARY

Municipalities have long included in their cable franchises requirements for cable operators to provide an emergency alert capability which the municipality may use. Such cable-based local alert systems provide the only direct, immediate means, which is totally under the municipality's control, for a municipality to communicate with its residents in the event of an emergency (all other means of communication require the cooperation or acquiescence of third parties, such as state or local emergency management officials and broadcasters, which

cooperation may or may not be given and which delays the alert). Such cable-based local alerts typically go only to residents of a specific municipality or municipalities and tend to address emergencies that are either localized (hazardous material spills, sudden road closures) or are not as severe as those carried over the Federal Emergency Alert System ("EAS") and in either event are not appropriate for broadcast over a much larger area. Such cable-based local alert provisions provide municipal officials with a more targeted alert system than is provided under the current Federal EAS. Emergency alert provisions of franchises also sometimes require that the cable operator carry state and local alerts that are sent on the Federal EAS system – a participation which is otherwise left voluntary under the Federal rules for cable operators. Such provisions thus can complement and expand the usefulness of the Federal EAS, as well as provide a more localized back-up system for the Federal system.

Municipalities have two major concerns with the current EAS rulemaking: first, that the separate cable-based local alert systems required under cable franchise agreements cannot legally be and should not be preempted under the Commission's rulemaking, and second, that local government be given a significant role in developing and participating in any broadened Federal EAS that develops out of this rulemaking and that structural impediments to their participation in the Federal EAS be removed.

Three changes to the existing Federal EAS would significantly enhance the ability of local officials to use that system for local emergencies. First, participation in state and local alerts over the Federal system must be made mandatory for cable, broadcast, DBS, and other media before local officials can rely on it for emergency broadcasts. Second, by mandating use of the more specific location codes promulgated in 2002, the Commission could make the Federal system more appropriate for use by local officials for local alerts. And finally, local officials must be able to send out an alert without having to seek approval and rely on the

discretion of others regarding if, when, and how the alert will be carried on the Federal system before it can be a reliable tool for local governments under emergency situations. By making these suggested changes, the Commission will help to ensure that local first responders have maximum flexibility to respond to emergencies, large and small, and will help to ensure that important local alerts are received by the public.

INTRODUCTION

For over forty years municipalities in their cable franchises have required that cable operators provide an emergency alert capability which the municipality may use.¹ Such alert systems provide the only direct, immediate means, which is totally under the municipality's control, for a municipality to communicate with its residents in the event of an emergency (all other means of communication require the cooperation or acquiescence of a third party, such as radio stations, which cooperation may or may not be given and which delays the alert). Alerts regarding emergencies that either cover a large area (a hurricane, tornado alerts) or are severe tend to be covered by the Federal EAS (which typically sends alerts to large areas, such as one or more counties). Local alerts on the cable system, by contrast, typically go only to (a) residents of a specific municipality or municipalities and tend to address emergencies that are either (b) more localized (hazardous material spills, sudden road closures) or are (c) less severe and in either event are not appropriate for a much larger area. Such local cable alert provisions predate by decades and supplement the more recent requirement that cable operators participate in the Federal Emergency Alert System ("Federal EAS"). There are some 36,000 municipalities nationwide, and thousands of these have some kind of emergency alert requirement in their cable

¹. "Municipalities" include cities, counties, villages, towns and other units of local government which under state law issue cable franchise.

franchise.² Emergency alert provisions of franchises also sometimes require that the cable operator carry state and local alerts that are sent on the Federal EAS system — a participation which is otherwise left voluntary under the Federal rules for cable operators. Such provisions thus can complement and expand the usefulness of the Federal EAS, as well as provide a more localized back-up system for the Federal system.

The Municipalities have two major concerns with the current EAS rulemaking: first, that the separate local alert systems required under cable franchise agreements cannot legally be and should not be preempted under the Commission's rulemaking, and second, that local government be given a significant role in developing and participating in any broadened Federal EAS that develops out of this rulemaking and that structural impediments to that participation be removed.

BACKGROUND

There has been renewed interest by local government in cable-based local emergency alert systems since the terrorist attacks of September 11, basically for six reasons:

1. The managers of the Federal EAS typically will not carry announcements of lesser emergencies specific only to one or two municipalities. Their reasons are understandable — Federal emergency alerts typically cover a multi-county area. They therefore only carry major alerts (of interest to the entire area) due to fears of "crying wolf" — that residents will start to ignore alerts if they receive too many that are not applicable to them.
2. Cable-based alert systems provide a means of notifying residents of emergencies applicable only to the municipality in question.

². The Partnership for Public Warning's 2004 Assessment takes note of the long history of the cable television industry in providing local emergency alert capability, which is controlled by municipal officials. See, Partnership for Public Warning, *The Emergency Alert System (EAS): An Assessment*, February 2004, p 19.

3. Carriage of state and local alerts on the Federal EAS is not mandatory — it is purely voluntary by cable companies, broadcasters and the like.³ An effective emergency alert system requires a means of communication which is mandatory and thus can be relied on. Including such a requirement in a cable franchise does this.
4. Cable-based local alert systems provide municipalities with an immediate, direct means of communication with their residents that does not require the cooperation or acquiescence of third parties (Federal EAS managers, radio stations and the like) with consequent possible delays, rejections of the alert or changes to it .
5. Cable-based local alert systems provide needed redundancy in case the Federal EAS fails to work.
6. All emergencies are local emergencies. Whether the event is an overturned truck, a flood, a hurricane, or a terrorist attack, it is local officials who must be the first responders and who must, at least initially, alert the public and organize a response.

Needless to say underlying the preceding is the heightened awareness of the need for effective emergency communications for all emergencies, large and small, in the aftermath of the September 11th attacks.

Local Versus Federal Emergency Alert Systems. Cable-based local alert systems and Federal emergency alert systems have co-existed for nearly fifty years. Cable-based local alert systems started in the 1950's with provisions in local cable franchises such as the following:

Emergency Use of Facilities. In the case of any emergency or disaster, the grantee shall, upon request of the Mayor of the City of Ann Arbor, or of his

³. 47 CFR §§11.1 and 11.55.

designated agent, make available its facilities to the City of Ann Arbor for emergency [use] during the duration of such emergency or disaster.

Emergency Alert. The system will be engineered to provide an Audio Alert System. This system would allow certain authorized officials to automatically override the "audio" signal on all channels and transmit and report emergency information.

City of Ann Arbor, Michigan 1970 City Code, Chapter 32 "CATV Ordinance" at Sections 2:1119 and 2:120.

Such cable-based local alert systems started from the "bottom up" in the cable franchises of specific municipalities. The preceding excerpts are typical in that the franchises tend to set forth provisions embodying either or both of the following concepts:

1. The ability of the municipality to broadcast an audio and video alert on all cable channels in the event of an emergency or
2. The ability of the municipality to use the cable operator's facilities (which would include both the cable system per se and video production facilities) in the event of an emergency.

By contrast, the Federal EAS is a product of the Cold War. It started off in 1951 as CONELRAD (Control of Electromagnetic Radiation) and evolved in the 1960's to the Emergency Broadcast System ("EBS") to allow presidential (and other Federal) activation and announcements in the event of an emergency. In a word the EBS system was originally aimed at getting the word out that "the bombers are coming" and reflects a "top down" approach. For the first forty years (1950's until 1990's) the Federal System was only applicable to broadcasters (*i.e.*, radio and TV stations).⁴

⁴ For more complete history of the Federal EAS see, for example, *In Re Amendment of Part 73 Subpart G of the Commission's Rules Regarding the Emergency Broadcast System*, Report and Order and Further Notice of Proposed Rulemaking, FCC 94-288 (December 9, 1994)("First Report and Order"), ¶¶3 and following.

In 1992 the Federal Cable Act was amended to extend what was to become the Federal EAS to cable systems. Specifically, cable systems were required to provide the same emergency information as broadcasters.

[E]ach cable operator shall comply with such standards as the Commission shall prescribe to insure that viewers of video programming on cable systems are afforded the same emergency information as afforded by the Emergency Broadcasting System pursuant to Commission regulations in subpart G of part 73, title 47, Code of Federal Regulations.

Cable Act § 624 (g); 47 U.S.C. § 544(g).

In a series of rulemakings that went on for several years the Commission adopted rules implementing the preceding statutory change. Under these regulations, cable systems became subject to the newly renamed "Federal Emergency Alert System" requirements on December 31, 1998 (for larger cable systems) and October 1, 2002 (for cable systems with fewer than 10,000 subscribers).

The result of the preceding statute and rulemakings was the revamped, current Federal EAS with one unified system covering radio and TV stations, cable systems and so-called wireless (microwave) cable systems. This system was designed for Federal alerts, although NOAA weather alerts are generally carried as well. But on the current Federal EAS, as noted above, carriage by cable systems (and broadcasters) of state and local emergency alerts is purely voluntary — not mandatory. The voluntary nature of carriage by cable systems and broadcast stations of local emergency alerts is one problem with the Federal system from a local perspective.

The current Federal system remains a "top down" system: Its operation is set forth in state emergency action plans and subsequent local (typically county) plans, all of which must receive Commission approval in advance. It is principally oriented towards the dissemination of

emergency alerts from the Federal (or state or county) level. The plans typically do not allow for direct municipal (city, town, village, parish) access to the Federal system.

In this regard the Federal EAS typically has a relatively short state plan which delegates most of the actual operational authority to counties. Counties (either a single county or a group of counties) typically administer the plan on a day-to-day basis. Only entities named in the Commission-approved state and local plans can initiate alerts. Typically these entities are:

- The Federal Government
- NOAA
- The state in question
- A local emergency manager - often at the county level.

Local units of government (cities, towns, villages, and the like) typically are not included on the preceding list and can only place alerts on the Federal EAS by contacting their local county emergency office and asking that an alert be put out. As noted above, such requests are not normally honored for purely local emergencies. The Federal system in practice covers all radio, TV stations and cable systems in a large (often multi-county) area. The resulting reluctance of Federal EAS managers to carry purely local alerts is valid from their perspective and often from a municipal perspective as well: municipalities often don't want local emergencies publicized area-wide because this is unnecessary, attracts gawkers who can interfere with emergency efforts, and can lead to congestion and create additional complications (such as secondary accidents and fender benders).

LOCAL ALERT SYSTEMS AND NATIONAL UNIFORMITY

In the NPRM, the Commission has highlighted a number of reasons why the current voluntary Federal EAS system may not be adequate for the challenges faced today by Federal, state, and local emergency managers, and proposes a uniform national system functioning

according to Federal standards. The Municipalities are concerned that an effort to achieve national uniformity might result in a proposal to preempt other, alternative alert systems such as those required under many cable franchises. For this reason, it is important to point out that the Commission lacks statutory authority to preempt these cable franchise-based local alert systems.

No Federal Preemption. In a series of questions in the NPRM about Federal/state responsibilities and the development of a uniform state and local EAS plans along national standards, the Commission inquires about its statutory authority to take such actions. *See*, NPRM ¶¶ 22-26. Without addressing these questions in their entirety, the Municipalities wish to assert that the Commission lacks the statutory authority to preempt cable franchise-based local alert systems. Congress has made municipalities the sole decision maker as to whether a local alert system is required in a cable franchise, and has deprived the Commission of the authority to override such decisions.

Specifically, the authority of municipalities to require local alert systems in cable franchises is governed by Section 626 of the Cable Act dealing with franchise renewals. 47 U.S.C. Section 546.⁵ As is set forth in some more detail below, in Section 626 Congress gave municipalities (not the FCC) the authority decide what provisions (such as a local emergency alert system) are necessary in a cable franchise to meet their community needs. Under the Cable Act, a municipality's decision is dispositive unless appealed to the courts. 47 U.S.C. Sections 546(e), 555. Appeals do not go to the Commission. Congress provided no role for the Commission in franchise renewals, including their local alert system requirements.

⁵. The Commission has previously recognized that municipalities can obtain local alert systems via their cable franchises through franchise agreements with the cable operator. *See In re. Amendment of Part 73, Subpart G, of the Commission's Rules Regarding the Emergency Broadcast System*, Third Report and Order, FCC 98-329 (December 23, 1998), ("Third Report and Order") at ¶13 ("municipalities can control such [local] emergency notifications through cable franchise agreements").

By way of background, prior to the 1984 Cable Act the Commission claimed some jurisdiction with regard to the content of local cable franchises. One of the significant changes wrought by the 1984 Cable Act was in Section 626, which sets forth the process for renewing cable franchises. As pertinent here, it gives solely to the local municipality the authority to impose and approve franchise terms which the legislative body of the municipality determines meet the "cable related needs" of the municipality. For example, 47 U.S.C. Section 546 (a)(1) requires a municipality to conduct a proceeding to identify its "future cable-related community needs and interests":

A franchising authority may, on its own initiative during the 6-month period which begins with the 36th month before the franchise expiration, commence a proceeding which affords the public in the franchise area appropriate notice and participation for the purpose of (A) identifying the future cable-related community needs and interests, and (B) reviewing the performance of the cable operator under the franchise during the then current franchise term. If the cable operator submits, during such 6-month period, a written renewal notice requesting the commencement of such a proceeding, the franchising authority shall commence such a proceeding not later than 6 months after the date such notice is submitted.

Likewise, 47 U.S.C. Section 546 (c)(1)(D) states that the failure of a cable operator's proposal for a renewed franchise to meet "future cable-related community needs and interests" is one of only four grounds upon which a municipality may deny the renewal of cable franchise:

(1) Upon submittal by a cable operator of a proposal to the franchising authority for the renewal of a franchise pursuant to subsection (b) of this section, the franchising authority shall provide prompt public notice of such proposal and, during the 4-month period which begins on the date of the submission of the cable operator's proposal pursuant to subsection (b) of this section, renew the franchise or, issue a preliminary assessment that the franchise should not be renewed and, at the request of the operator or on its own initiative, commence an administrative proceeding, after providing prompt public notice of such proceeding, in accordance with paragraph (2) to consider whether —

(A) the cable operator has substantially complied with the material terms of the existing franchise and with applicable law;

(B) the quality of the operator's service, including signal quality, response to consumer complaints, and billing practices, but without regard to the mix or quality of cable services or other services provided over the system, has been reasonable in light of community needs;

(C) the operator has the financial, legal, and technical ability to provide the services, facilities, and equipment as set forth in the operator's proposal; and

(D) the operator's proposal is reasonable to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests. [Emphasis added.]

A municipality's determination of its future cable related needs is a legislative decision which is reviewed by the courts under a jury verdict standard of review, *i.e.*, will be affirmed by the courts if there is any evidence in the record to support it. *Union CATV v. City of Sturgis*, 107 F. 3d 434 (6th Cir. 1997).

Congress appropriately has thus made each municipality the paramount decision-maker as to what is necessary in a cable franchise to meet its needs subject only to court review under the standard just noted.

By contrast, the Commission's authority regarding emergency alert systems, including any ability to regulate or preempt local alert systems required by cable franchises, is limited to that which it possesses under the Federal Communications Act of 1934, as amended, 47 U.S.C. Section 151 and following ("the Communications Act"), of which the Cable Act is Title 6. As the NPRM notes,⁶ the statutory authority on which the Commission relies to issue revised rules regarding emergency alert systems largely rests on Section 4(i) of the Communications Act, which gives the Commission the authority to perform those acts "not inconsistent with [the Communications Act]" necessary to fulfill the Commission's functions. 47 U.S.C. Section 154(i). Any attempt to preempt cable franchise-based local alert systems is inconsistent with the express provisions of Cable/Communications Act Section 626 and thus beyond the

⁶ NPRM, ¶10.

Commission's authority. At most (see below) under the Communications Act the Commission has the authority to preempt local emergency alert requirements to the extent they interfere with the operation of the Federal EAS.

FCC Rejects Preemption. Consistent with the preceding (although not expressly acknowledging in so many words its lack of authority in this area) since 1992 the Commission has repeatedly rejected attempts by broadcasters and cable companies to preempt cable-based local alert system requirements in cable franchises. Thus, in the First Report and Order regarding emergency alert systems issued in 1994, the Commission encouraged the use of emergency alert systems for purely local alerts: "Although not required we also encourage EAS activation for state or local emergencies." *First Report and Order* at ¶58. This encouragement came in the face of repeated opposition to local alert systems from cable operators and broadcasters.

But in response to such opposition the FCC then also sought "further comment as to whether the existence of conflicting requirements imposed by local franchising authorities poses any threat to the Federal objective of maintaining EAS nationwide alerting capability and, if so, whether we should preempt application of these conflicting requirements." *Id* at ¶153.

In response, in its Second Report and Order in 1997 the FCC concluded against outright preemption of franchise requirements for local emergency alert systems, stating that "requirements of existing local franchise agreements for special warning systems will not be preempted by the EAS so long as they do not conflict with EAS requirements under our rules." *In re. Amendment of Part 73, Subpart G, of the Commission's Rules Regarding the Emergency Broadcast System*, Second Report and Order, FCC 97-338 (September 29, 1997) ("Second Report and Order"), ¶1. The FCC went on to say "we also note that [our] decision does not affect [a municipality's] power to require state and local emergency alerting as part of a franchise

agreement." *Id.* at ¶22. The FCC concluded that, "we believe that franchising officials are most familiar with local condition and threats to their communities as well as the types of emergency information needed to respond to such threats. They are also best suited to work within their communities to develop state and local emergency alerting plans." *Id.* at ¶33.

In its Third Report and Order, the Commission addressed a request by the National Association of Broadcasters ("NAB") to mandate selective channel overrides that prevent program interruption on broadcast channels when a cable system that carries that broadcast station provides a state or local EAS message.⁷ *See, In re. Amendment of Part 73, Subpart G, of the Commission's Rules Regarding the Emergency Broadcast System*, Third Report and Order, FCC 98-329 (December 23, 1998), ("Third Report and Order"). The Commission rejected this request and reiterated its conclusion in the Second Report and Order about the importance of local alert systems:

[C]able systems may be better suited [than broadcasters] to provide necessary emergency information to local communities. For instance, the record indicates that many local governments view cable television systems as a primary means of notifying residents about local emergencies since municipalities can control such emergency notifications through cable franchise agreements -- control they do not have over broadcasters. The record further suggests that because broadcast stations often serve a wide coverage area crossing hundreds of communities, they may not cover local emergencies that affect only a single community. By contrast, cable franchise agreements frequently require local cable systems to cover all local emergencies. Additionally, many local governments consider cable television systems to be a primary means for alerting local residents of non-weather related emergencies, such as hazardous materials spills or local road restrictions, which tend to affect a more confined area than weather-related emergencies and therefore may not be covered by an area TV station. . . . Neither NAB ["National Association of Broadcasters"] nor any commenters supporting NAB's proposal have raised a compelling basis for changing our existing policy by regulating local EAS messages through mandatory selective override.

Third Report and Order, ¶13 (footnotes omitted, emphasis added).

⁷. The NAB has apparently renewed its efforts in this regard under this proceeding, according to a notice of ex parte communication dated September 8, 2004 and filed under this docket.

The conclusion to the Third Report and Order contains some of the strongest language in the Commission's Orders in support of franchise requirements for cable-based local alert systems:

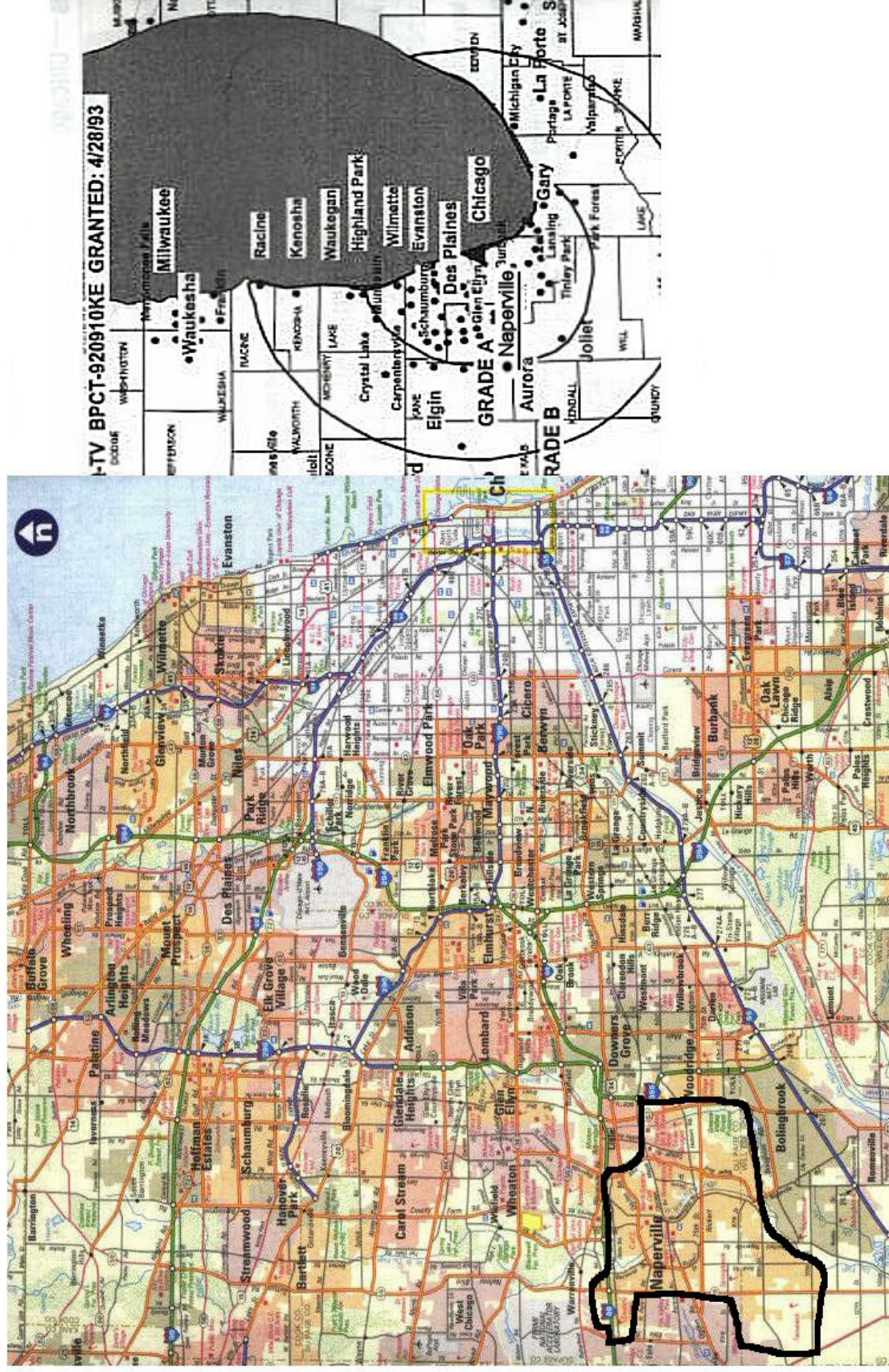
We therefore decline to preempt provisions of cable television franchise agreements that require emergency messaging over all cable channels. Neither NAB nor the other commenters . . . have provided sufficient grounds for overturning our decision in the *Second R&O* not to preempt existing franchise agreements that require emergency alerting for local conditions. To the contrary, the record in this proceeding continues to support our finding that "franchising officials are most familiar with local conditions and threats to their communities as well as the types of emergency information needed to respond to such threats. They are also best suited to work within their communities to develop state and local emergency alerting plans."

Id. at ¶15, quoting Second Report and Order at ¶33 (footnote omitted, emphasis added).

Far from interfering with the Federal alert system, the Commission has found that local alert systems complement and reinforce the Federal system in useful ways. In past rule makings, the Commission has determined that such local alert systems are valuable in providing localized alerts for local emergencies for which activation of the Federal EAS on a regional or county-wide basis would not be appropriate. *See*, Third Report and Order, ¶8 (citing uses of a local alert system for notification of hazardous materials spills, prison escapes, and local snow emergencies). Generally, alerts regarding emergencies that either cover a large area (*e.g.*, hurricane or tornado alerts) or are particularly severe tend to be covered by the Federal EAS, which typically sends alerts to large areas such as one or more counties.

Local alerts, on the other hand, go only to the residents of a specific municipality or municipalities and tend to address emergencies that are either more localized (gas leaks, sudden road closures) or less severe and thus not appropriate for a much larger area. Just how much more localized a cable-based local alert is than one sent out over a local broadcast television station is shown by Figure 1, which illustrates the difference in coverage area between an alert

Figure 1: Naperville Local Alert Boundaries vs Broadcast Area of WMAQ



sent out over the cable system in the City of Naperville, Illinois and one sent out over WMAQ, the local NBC affiliate. As Figure 1 graphically attests, an alert carried by WMAQ (or other similar Chicago TV stations) goes to the residents of hundreds (if not thousands) of municipalities located in Illinois, Wisconsin, Northern Indiana, and Southwest Michigan. By contrast an alert sent out over the cable TV system in the City of Naperville reaches no further than the municipal boundaries. Thus, the cable-based local alert system does not so much duplicate the capabilities of the Federal EAS, as it adds value by enabling a more directed and localized alert for local emergencies.

Local alert systems also provide local governments the ability to directly reach their residents over a system which is required to carry their messages, in contrast to the Federal system where municipal officials often have to go through a local emergency management official to get the approval necessary to have an alert sent, and even then because of the voluntary nature of participation in state and local alerts, there is no guarantee that the cable operator will carry the message. For a concrete example of the usefulness of such local alerts in the event of an emergency that was not just local, see the newspaper article attached as Exhibit 1 about Pasco County Florida's use of its live emergency alert capability during the recent hurricanes which hit the state. The county was able to use its alerting capability in combination with a live broadcast ability over its government channel to urge residents to evacuate. As the article attests, there is reason to believe that the access to the public thus provided made a difference in ensuring public safety and will help in similar emergency situations in the future. The county's Emergency Management Director concluded that this capability will be essential in responding to future emergencies. In this and similar instances, the directness and efficiency which cable-based local alerts offer local officials in reaching the public have proved their value repeatedly in emergency situations.

Because local alert systems have proven to be so valuable for communities in their responses to emergencies, the Commission must resist appeals from broadcasters or others to limit or restrict cable operators' ability to override local broadcasters in the event of a local emergency. Should local officials be unable to override local broadcast stations on the cable system, a significant portion of the very audience which officials are trying to reach would be unable to receive the emergency alert. Because these alerts are usually very brief, they do not completely preempt local broadcast coverage of events, and so do not impose a significant hardship on broadcasters, particularly in light of the necessary service provided by such alerts. Such alerts are the best means for local officials to disseminate valuable information and instructions for dealing with a local emergency. In fact, the cable-based local alert systems often send out alerts which broadcasters would not carry because the alert is relevant to only one municipality, while the local broadcast station typically reaches dozens or even hundreds of other communities as well in its broadcast area (see Figure 1). Broadcasters cannot and will not carry community-specific alerts for each of the communities in their broadcast area.

The decision of when and how to propagate local alerts must be left in the hands of local officials. As noted above, the Commission concluded in earlier rulemakings that, "franchising officials are most familiar with local conditions and threats to their communities as well as the types of emergency information needed to respond to such threats." Third Report and Order at ¶15, *quoting* Second Report and Order at ¶ 33 (footnote omitted). The decision as to whether a local emergency is grave enough to warrant temporary preemption of local broadcasting or not is a decision which should be left in the hands of the local officials who will be the first responders to an emergency, and will be called upon to formulate the initial strategy for dealing with it.

Redundancy. The NPRM raises the further issue of whether alternate public alert and warning mechanisms should be incorporated with the Federal EAS into a "comprehensive national public warning system." *See*, NPRM ¶¶ 31-35. While municipal cable-based local alert systems do not reach segments of the public additional to those reached by the Federal EAS, municipal emergency managers nevertheless value local emergency alert systems for the redundancy they provide. They are a backup in case the Federal system does not operate fully or as planned. As municipalities have observed in practice, the Federal EAS frequently does not work as planned. For example, while testing its own local emergency alert system this year, the City of Mesa, Arizona found that test alerts on the Federal system were not being carried on any digital channels in that City. This problem apparently originated with the entity generating the statewide test in question, such that if it had been a real emergency, Federal alerts would not have been carried on digital channels anywhere in Arizona. By contrast, that City had tested its local alert system to make sure that local alerts were going out on all channels, analog and digital. If there had been a real Federal alert, the City could have rebroadcast it to reach viewers of digital channels who otherwise would not have gotten the Federal alert.

The bottom line is that redundancy is a key element for vital systems, such as emergency alert systems. Humans and systems can and will fail, often at the most inopportune times. Cable-based local alert systems have and can continue to play an important role by providing redundancy in this regard. However, for such systems to retain the flexibility and independence from the Federal EAS that they currently enjoy and which makes them effective backups to that system, they cannot be incorporated into a uniform national system subject to Federal standards. They must remain responsive to local needs and be available at the discretion of local officials.

A common objection to cable-based alert systems is that "not everyone gets cable, and TV sets aren't on all the time." The Municipalities' response is that local emergency managers need to be provided with several means of reaching their residents in an emergency so that they can choose the ones appropriate for their situation. No one system is comprehensive. For example, emergency sirens are adversely affected by wind and weather and sometimes cannot be heard in buildings. Reverse 911 systems don't reach people without telephones and may not reach those with cellular phones or VOIP telephony (such as a VOIP number with a different area code or exchange). Radio and TV alerts can reach people quickly but radios and TV's are not on all the time and often provide coverage far beyond the area targeted for the alert . Thus, the deficits of a cable-based local alert system (only approximately 62% of the U.S. households with televisions subscribe to cable and TV sets are typically on about seven hours per day) must be placed in perspective. Municipalities must be allowed a range of options so that they may select the most appropriate means of communication for any given emergency. As discussed above, the Federal Cable Act contemplates exactly this — municipalities in franchise renewals are to assess their community's needs and specify the franchise terms (such as cable local emergency alert systems) which they determine will meet those community needs.

HOW LOCAL ALERT SYSTEMS WORK

Typical Messages. Cable local emergency alert systems are used for what might be best described as medium level emergencies and messages. Alerts regarding more severe emergencies or those covering a larger area are likely to be carried on the Federal Emergency Alert System.

Examples of the types of items leading to alerts on the cable-based local alert system include the following:⁸

- An unexpected road closing, such as due to an accident, flooding, derailment or the like.
- A local toxic waste spill or discharge into a waterway.
- Local gas leak with instructions to residents (stay indoors, avoid the use of open flame).
- Localized severe weather such as flooding or storms. This may be particularly important in mountainous, lakeside or ocean areas where the weather (such as snowfall) can vary substantially within a few miles (and the Federal EAS system cannot easily accommodate such local variation). Thus a municipality may use the cable local emergency alert systems to notify residents that snow emergency alternate side of the street parking restrictions are in effect — without these restrictions snowplows cannot easily get through and thus fire, police, EMS and other emergency vehicles could be significantly delayed.
- Unexpected water problems such as the loss of pressure or breaks which may make the water unsafe to drink or require restrictions in water usage (so as to preserve water pressure for fire protection).

⁸ Note that in part the frequency and length of alert messages may be affected by the type of technology being employed. Specifically on older systems and on some analog channels the typical means of providing an emergency alert involves totally replacing both the audio and video programming with a message about the alert. By contrast on digital channels and on many analog channels the alert is often somewhat less obtrusive—a video crawl or scroll across the bottom of the screen with an accompanying short audio message. Also, the number of alerts issued by a municipality may be affected by the extent to which the cable operator can confine the alert to the municipality in question.

Implementation. Typical implementation of a cable-based local alert system in a modern franchise is often as follows.⁹ First, franchises often make the carriage by the cable operator of state and local alerts from the Federal EAS mandatory. This resolves the "voluntariness" problem with the Federal EAS set forth above. The Commission has specifically allowed municipalities to require this in franchises. *See*, Second Report and Order at ¶22 ("we also note that [our] decision does not affect [a municipality's] power to require state and local emergency alerting as part of a franchise agreement.")

With respect to the cable-based local alert system proper, municipal access to the system is typically only by designated officials (usually fire or police officials who are on duty 24 hours a day) and have emergency preparedness responsibilities. Access is preferably by city officials dialing a number using a PIN code. This allows access where appropriate from remote locations or from a cell phone.

Due to the design of cable systems, emergency messages in some cases may go beyond the borders of the municipality in question. This depends upon the particular architecture and design of the cable system in each municipality. In some instances the cable system has been designed so that "node boundaries" correspond exactly with political boundaries such that messages will only go to the municipality in question. In other cases, the cable company can restrict messages to certain "nodes," "mini headends" or the like so that the overlap of a message into adjacent communities is reduced. Due to this overlap potential, municipalities and cable companies often prefer that local alerts be done by means of an all channel "crawl" or scroll across the bottom of the screen. This minimizes the disruption to conventional programming as compared to "screen blanking" or "video

⁹ See in this regard the emergency alert provisions from the City of Mesa, Arizona's 2003 Cable Franchise with Cox Communications set forth in Exhibit 2.

blanking" where the entire video picture is blanked out or replaced by the emergency announcement.

A related approach (*see*, for example, Mesa, Arizona franchise excerpt attached as Exhibit 2) is to target messages to residents of particular communities by having the emergency alert message direct viewers to the government channel of the municipality triggering the alert. Under this approach, for example, the emergency message would be "City of Metropolis residents, the City of Metropolis is issuing an emergency alert. Please tune to the City of Metropolis government channel 11 for details." The specifics regarding the alert (nature of the problem, what to do) would then be on that city's government channel.

This approach works because typically a municipality's government channel can only be viewed by residents of that municipality — cable companies often can better target public, educational and government channels to a specific community than they can target emergency alerts. Thus although residents of an adjacent community might be aware that there was some kind of emergency alert in the "City of Metropolis" they would not be able to view the alert and the consequent risk of "crying wolf" or attracting crowds from other communities is reduced. This approach obviously works well where emergency alerts go to multiple communities.

A different solution uses the location codes (generally portions of a county, although smaller subdivisions may be possible) included in the Federal EAS to specify the geographic area to which an alert is targeted to help restrict emergency alerts to a particular community. Cable operators can target alerts to addressable analog or digital set top converters in the area specified by a given location code. However, this must be used in conjunction with a different approach (such as restricting the portion of the cable system on which the alert is

disseminated) for viewers with analog televisions, because the "location code" approach will not work with such sets.

Thus, in terms of the content of an alert, communities face two main choices: Either having the information on the emergency in question in the message itself ("gas leak at Hollywood and Vine, residents of the area should stay indoors, avoid open flames") or the approach of having the message indicate that there is a local emergency in the City of X and residents of that city should tune to their government channel for specifics.

Audio and Video. The same alert message is typically provided on both the audio and video on all channels such that the message is equally available to the hearing impaired and the visually impaired. This assures that the message is available to all citizens and prevents Americans with Disabilities Act or equal protection problems.

VOLUNTARY PARTICIPATION IN THE FEDERAL EAS

The NPRM inquires whether rules should be adopted requiring the filing of state and local EAS plans and setting forth guidelines and standards for such plans. *See*, NPRM ¶ 25. The Municipalities perceive real value to be gained by requiring the state and local plans to be adopted and implemented; however, care must be taken that when standards and guidelines are drawn up local governmental units are able to participate directly in both the planning and implementation of the system. Municipalities must be able to send alerts directly on the new Federal system without going through an intermediary to gain access, and must be able to target their alerts to their specific community, as they can with cable-based local alert systems. There are three areas where the Municipalities see that changes could be made to the existing Federal system to better enable local participation: 1) providing direct access to the Federal EAS for local officials needing to send out local

alerts, 2) requiring use of the more specific location codes promulgated in 2002, and 3) requiring DBS, cable, and broadcast media to participate in state and local alerts.

Unmediated Access to the EAS. Municipalities face serious challenges in trying to send out messages to their local communities over the Federal EAS, as noted above. In part, these arise because under the current rules there are often two layers of intermediaries which have to approve an emergency message before it will be sent. First, Municipalities must gain the assent of the designated local emergency management official, who is often not an official of a local city, town, or village, but of a county which includes several such cities, towns, and villages. Such an official is often not in a position to understand the necessity for the local alert, and valuable time is spent in pleading the case for why an alert is needed. As noted above, in many cases, this official's assent is not given.

If the designated local official does approve the alert, then because of the voluntary nature of participation in local and state alerts, the cable company or local broadcaster may choose not to carry the alert, may delay the alert, or may edit or shorten the alert before carrying it. For the Federal EAS system to work effectively for local government officials, these layers of intermediaries must be stripped away and local officials given unmediated access to the system. Only when local officials can send out an alert without having to seek approval and rely on the discretion of others regarding if, when, and how the alert will be carried will the Federal system be a reliable tool for local governments under emergency situations.

Mandating Use of Expanded Location Codes. One obstacle municipalities often face currently with regard to using the Federal EAS effectively is related to the impossibility of targeting only a single municipality with a Federal EAS message. The broad dispersal of alerts over the Federal system raises the aforementioned "crying wolf" concerns on the part

of emergency management officials and results in many local alerts not being carried. While the concerns of emergency management officials about the deleterious effects of the public receiving non-relevant alerts are understandable, the effect of such decisions is to remove the decision-making power over when and how an alert is to be broadcast from the hands of the local municipal officials who are the first responders to a local emergency, and who bear the brunt of the effort of addressing the emergency, and instead placing that decision-making authority in the hands of a local emergency manager who may or may not choose to honor the municipality's request to broadcast an alert. As the Partnership for Public Warning observed in its May 16, 2003 report, "Few local emergency managers or first responders have effective ways to input information and warnings directly into these systems," p. 16. It is largely because of this structural defect that "[f]ew EAS messages are generated by state and local emergency managers." *Id.*, p. 14. Despite this, "the vast majority of emergencies occur at the local level." Partnership for Public Warning, *The Emergency Alert System (EAS): An Assessment*, February 2004, p. 17.

This disjunction between the need and ability of local governments to access the Federal EAS can best be addressed by mandating use of the more localized location codes adopted in the Commission's 2002 Report and Order. The Municipalities believe that full implementation of these more specific location codes would aid in increasing local governments' involvement in the Federal EAS by enabling them to target smaller areas for local alerts.

Making Participation Mandatory for DBS, Cable, and Broadcast Media. The current voluntary nature of participation in state and local alerts places discretion in the hands of broadcasters and cable operators rather than local or state emergency management officials. Local officials, who have the most knowledge regarding the specifics of an emergency

situation and are in the best position to know what resources are available and what actions should be taken should be responsible for determining when and to whom an alert regarding a local emergency should be sent. For the alert system to be fully effective, local officials must know that their alerts will be broadcast and that broadcasters, cable operators, and others will not be able to second guess their decision to send an alert, or even modify the alert before sending it. Such participation must include both digital and analog signals in order to ensure that significant numbers of viewers are not excluded from coverage by the alert.

Because DBS has now grown to reach a significant number of households in many markets, DBS providers should be required to participate in the Federal EAS system, subject to the same rules and restrictions which apply to cable operators and to broadcast television. These requirements should include mandatory participation in state and local alerts.

LOCAL PARTICIPATION IN THE FEDERAL EAS IS ESSENTIAL

The NPRM asks whether a Federal standard should be established for when the EAS may be activated, particularly for state and local alerts. *See*, ¶¶ 24-26. Such decisions are best left to the judgment of local officials who understand local needs and can evaluate the nature of an emergency situation as it unfolds. As the Commission has previously determined, "We believe that franchising officials are most familiar with local conditions and threats to their communities as well as the types of emergency information needed to respond to such threats." Second Report and Order, ¶ 33. Rules imposed from the Federal level, and perhaps long in advance of an emergency situation, cannot anticipate all the possible and unexpected contingencies which could unfold at the local level in the event of an emergency. Allowing local officials access to either the Federal EAS, by removing the structural impediments to their use of the system, or to a local cable-based alert system

provides the maximum flexibility for decision-makers, and leaves the decisions in the hands of local officials who are best able to make determinations about how best to address an emergency situation. Therefore, the twin concerns of the Municipalities in this rulemaking, that cable-based local alert systems not be preempted and that access to local alert capabilities of the Federal EAS be increased for local governmental officials are neither mutually exclusive nor redundant. Because the two systems each have their own strengths and weaknesses, and are useful for different kinds of emergency situations, providing for both would increase the ability of local officials to respond flexibly to unforeseen emergency situations and would ensure an alternative should either system fail. Thus, the increased access to the Federal EAS for local and municipal officials sought by the Municipalities does not obviate the usefulness or need for cable-based local alert systems, nor does the existence of such cable-based systems completely remove the need for local officials to have freer access to the Federal EAS for local alerts.

CONCLUSION

For the reasons discussed above, the Municipalities request that in the current EAS rulemaking, the Commission affirm the capability of local franchising authorities to require cable-based local alert systems as a necessary supplement to the Federal EAS in providing truly localized alerts, and as an important backup system to the Federal EAS. The Municipalities also suggest that the requirements for cable, broadcast, DBS and other media participation in the Federal system, including local and state alerts, should be strengthened and structural barriers which prevent full participation by local government in the Federal system be removed. By doing so, the Commission will ensure that local first responders

have maximum flexibility to respond to local emergencies, large and small, and will help to ensure that important local alerts are received by the public.

Respectfully submitted for,

MUNICIPALITIES AND
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EXHIBIT 1

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Unprepared, yet unharmed

A low response to warnings has officials hoping residents follow instructions next time.

By BRIDGET HALL GRUMET, Times Staff Writer
Published August 15, 2004

NEW PORT RICHEY - Michele Baker hesitates to use the old "cry wolf" analogy. But that may be the best way to put it.

After urging 168,000 people to evacuate, saying the hurricane could be worse than the 1993 no-name storm and plainly telling mobile home owners that their lives were in danger - the county's Emergency Management director watched Friday as Hurricane Charley brought only moderate rain and mild winds to Pasco County.

Officials agree the county was extremely lucky the storm took a dramatic last-minute shift, but does the near-miss only make it harder to warn residents the next time?

"There was a wolf," Baker said Friday afternoon, as it became clear the storm would largely spare Pasco County. "The wolf got off on a different path, but there was a wolf."

And it was a vicious creature. Charley was a Category 4 storm with 145 mph winds when it plowed into Punta Gorda on Friday afternoon, ripping out trees, destroying homes and leaving hundreds of thousands of people without power. Only a couple of hours before the storm made landfall, forecasters still thought it would charge into Tampa Bay.

"We got lucky," Baker said.

But it wasn't easy to persuade some residents to take the threat seriously.

The county recommended evacuations as the storm churned toward the bay Thursday evening, then declared mandatory evacuations at 6 a.m. Friday for everyone in mobile homes, most residents west of U.S. 19 and some east of the highway.

But by noon Friday, officials estimated only a quarter of those folks had actually left for higher ground. That estimate was based on the fact that only 1,600 residents had gone to the county's shelters, and officials figured thousands more went to stay with family or friends.

Baker made urgent pleas on the Pasco government cable access channel, telling residents their lives could be in danger if they tried to ride out the storm in their mobile homes.

She believes the pleas helped. By 4 p.m., county shelters had about 3,100 residents.

The would-be disaster was the first time Pasco officials provided live storm updates on the government access channel (channel 19 in west Pasco and channel 2 in east Pasco).

Baker appeared before the cameras every hour to tell viewers the latest.

The new capability will be clutch in future emergencies, Baker said, as the county will be able to provide real-time storm information directly to the public.

"The ability to go live with breaking information will prove valuable to us," she said. "Hopefully the word will be shared."

As far as getting more residents to take the hurricane threat seriously, Baker said, Mother Nature will provide the best lesson.

Just look at the devastation in southwest Florida - the snapped power poles, the roofs ripped from buildings, the shattered windows and debris - and realize only a slight change in the storm's path prevented that scene in Pasco County.

"There was a very real threat and (Pasco residents) are extremely fortunate," Baker said. "And next time there is a threat, hopefully they will be extremely fortunate, but we can't guarantee that every time."

"Isn't it better to expect it and prepare for it and be pleasantly surprised when it doesn't come?"

Bridget Hall Grumet covers Pasco County government. She can be reached in west Pasco at 869-6244 or toll-free at 1-800-333-7505, ext. 6244. Her e-mail address is bhall@sptimes.com

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EXHIBIT 2

Excerpt from City of Mesa, Arizona

2003 Cable License with Cox

4.8 Emergency Messaging:

4.8.1 In accordance with the provisions of FCC Rules and Regulations Part 11, Subpart D, Section 11.51(h)(1), and as such provisions may from time to time be amended, Licensee shall install and maintain an Emergency Alert System (EAS). As allowed by FCC Order FCC 97-338, Paragraph 33, Licensee shall transmit all national, state, and local activations of the Federal EAS, utilizing the four-part message protocol specified in FCC Rules and Regulations Part 11, Subpart B, or successor protocols. This shall include such local and state-wide situations as may be designated to be an emergency by the Local Primary (LP), the State Primary (SP) and/or other authorities identified and defined within FCC Rules and Regulations, Part 11 or the Local and State Plans provided for under those rules.

4.8.2 By December 31, 2003 and thereafter throughout the balance of the Term Licensee shall provide to the City without human intervention by Licensee, in times of a City of Mesa emergency and for periodic (e.g. – monthly) testing by Mesa, the right and the capability to directly access by remote control the video and audio of all channels to create and air one of two pre-established video scroll messages determined by Mesa (such as "Mesa Residents, this is a TEST of the City of Mesa Emergency Alert System. In an actual emergency you will be advised to tune to Mesa Channel 11 for details." Or "Mesa Residents, the City of Mesa is issuing an Emergency Alert. Please tune to Mesa Channel 11 for further details.") and a pre-established audio alert message with the same text as the video scroll message. The messages (1) may be changed by Mesa from time to time, and (2) shall advise Mesa residents to tune to the Mesa government channel, which is currently Channel 11 or the

equivalent thereof. Mesa and Licensee will work together to prevent the pre-established video scroll message from interfering with any separate video scroll message on Channel 11 (or the equivalent thereof) containing substantive information about a test or actual emergency, such as by ensuring that the scrolls appear in different places on Subscribers' TV screens. Licensee acknowledges that the City retains the right to review and approve the ability to directly access by remote control all channels prior to acceptance and approval of the capability. Prior to December 31, 2003, the parties shall determine mutually acceptable procedures and protocols for testing and activating the capability and shall set them forth in writing. Such procedures and protocols may be modified by mutual agreement in writing. These procedures and protocols shall include that all tests be conducted between the hours of midnight and 6:00 a.m., and for tests where Licensee is notified in advance City shall notify Licensee not less than twenty-four (24) hours prior to any such test. Unless otherwise agreed in writing between the parties, the procedures and protocols shall conform to those portions of Exhibit F which describe them. Mesa will withdraw its letter to Licensee of July 7, 2003 if by December 31, 2003 Mesa's independent cable engineering consultant certifies that Licensee has met the requirements of this Section 4.8.2, pursuant to tests which the consultant has conducted pursuant to the test plan set forth in Exhibit F of this License, or as otherwise agreed in writing by the parties. Licensee will cooperate with Mesa and the cable engineering consultant regarding such tests including supplying equipment (splitters, A/B switches, cables and the like) and appropriate personnel. Federal EAS alerts (meaning national, state and local alerts on the Federal EAS) and tests shall take precedence over and automatically override the Mesa video scroll messages and audio alert messages (including, in each case, test messages) provided for in this Subsection 4.8.2, and Licensee shall obtain and maintain appropriate hardware and software to accomplish the preceding. Licensee

agrees that this Subsection 4.8.2 complies with Federal law; and covenants not to sue or otherwise contend to the contrary. Within ten (10) days after receiving a copy of the engineering consultant certification described above Licensee will dismiss with prejudice its Federal court lawsuit against Mesa (CoxCom, Inc. v. City of Mesa, District of Arizona, Case # CV '03 1404 PHXSRB). Mesa and Licensee will cooperate as needed to extend the time for Mesa to answer the lawsuit and to obtain the dismissal with prejudice. Within ten (10) days after the Effective Date Licensee will withdraw with prejudice its May 29, 2003 letter to Mesa with a Federal Cable Act Section 625 license modification request, the lawsuit and modification request both generally contending that provisions in the Cable Ordinance and Licensee's prior license similar to those in this Subsection 4.8.2 are preempted under Federal law.